IN THE

United States Supreme Court,

No. **OCTOBER TERM, 1901.**

CHRISTIAN SCHWARTZ, a citizen of the State of West Virginia, ANTHONY KOTERBA, DAVID STROHAKER and ALLEN SHALE, citizens of the State of Ohio, and G. L. SHALE, a citizen of South Dakota,

vs.

JOHN S. DUSS, GOTTLIEB REITHMUELLER, FRANZ GILLMAN, CONRAD HERMANSDOERFER, EDWARD KELLERMAN, JOHANNA HERMANSDOERFER, SUSIA C. DUSS, KAROLINE MOLT, KATRINA NAGEL, ELIZABETH BECK, MARIA DIEM, BARBARA BOEH, FREDERICKA MUNTZ, DOROTHEA HOEHR, REGINA LAUTENSCHLAGER, CHRISTIAN RALL, HENRY HICE and JOHN REEVES, citizens of the State of Pennsylvania, and THE UNION COMPANY, a corporation, citizen of the State of Pennsylvania.

Brief for Respondents Against Petition for Certiorari.

We have filed herewith copies of the printed Argument for Appellees, presented to the Circuit Court of Appeals for the Third Circuit, which contains a full discussion of the various articles of agreement constituting the Harmony Society and establishing the rights and duties of its members, and, also, of the testimony bearing upon the various allegations of fact made by the petitioners, We cannot here undertake to repeat this discussion, but we must content ourselves with referring the Court to it for any information we fail to now set forth within the limits of this brief reply to petitioners argument.

History of the Litigation.

The plaintiffs are five persons who *never were, at any time, members of the Harmony Society.* They merely claim to represent, by consanguinity, the alleged rights of persons who were, at one time, (in each case very remote), members of the Society, and who died in membership, or withdrew from the Society many years ago.

The bill was filed June 27th, 1894. Under agreement of the parties and the order of the Circuit Court, the cause went to an Examiner and Master, February 28th, 1895. A very large amount of testimony was taken (about 3,000 type-written pages), and each side was allowed several days to discuss the questions before the Master. The Master held the case under advisement for about one year, and returned all the testimony to Court with his findings of fact, and conclusions of law, April 11th, 1898. After a most careful and elaborate consideration of all the testimony and all the questions of law, the Master found against the contentions of the plaintiffs upon every material question of fact, and every material question of law.

The plaintiffs filed fifty-one (51) exceptions to the Master's report. and several days were occupied by counsel in the argument of these exceptions before the Circuit Court.

The Court below (Circuit Judge Acheson), after carefully reading the entire evidence, overruled all the exceptions. approved all the findings of the Master and made a decree dismissing the Bill.

An appeal was taken to the Circuit Court of Appeals upon forty-eight (48) assignments of error, repeating the exceptions to the Master's report, and the whole case was again elaborately argued before Dallas and Gray, Circuit Judges, and Bradford, District Judge, and, by the unanimous opinion of the Court of Appeals, the conclusions of the Master and the Circuit Court were affirmed.

Such is a brief history of this litigation. The cause has been now pending in the lower Courts for six years; has been three times elaborately argued, and, upon each argument, the decision has been against the plaintiffs; and, yet, the chief reason, now urged by the petitioners for a fourth argument before this Court, is that the Master, the Circuit Court, and Circuit Court of Appeals have misunderstood their argument and contentions, and have not given them proper consideration.

This Court has said that the jurisdiction appealed to by this application is

> "a branch of its jurisdiction which should be exercised *sparingly and with great caution*, and *only* in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."
>
> *Amer. Construction Co. vs. Railway*, 148 U. S., 383.

And, in respect to all contentions of fact made by petitioners, out of which their alleged right is supposed to arise, this Court has many times ruled that the Circuit Court and the Court of Appeals, having agreed as to what were the ultimate facts established by the evidence, this Court should accept their view as to the facts, unless it clearly appeared that they erred as to the effect of the evidence.

Stuart vs. Hayden, 169 U. S. 14.

These principles ought to be decisive against the present application.

Questions Involved.

The petitioners seek to recover a portion of the property of the Harmony Society. They claim this, *not* because of any direct property interest either pretends to have, or because either was, at any time, a member of said Society; but, because, as they allege, their ancestors, in more or less remote degrees of consanguinity or affinity, at some period long past, *were* members, and either withdrew from the Society, and since died, or died while still members, and because, they allege, the Society is dissolved and has been abandoned, and hence they argue, in the general distribution of its property, they each are entitled, on account of some right transmitted from their dead ancestors, to a share.

The two questions, therefore, are:

1. Is either one of the petitioners a part owner in the property of the Harmony Society and entitled to an interest therein, even if the Society were dissolved?
2. Has the Harmony Society been dissolved?

There is absolutely nothing in the case but the attempt to reduce into possession certain property rights alleged to belong to petitioners. The money value of the alleged interest of these five petitioners, which is all that is involved in this litigation, is comparatively insignificant. During the period of its existence of nearly a century there have been about eleven hundred members of the Harmony Society. If the contentions of the present plaintiffs were well founded, there would be, probably, twenty thousand "heirs" entitled to a share of the Society's property; and, accepting the valuation of the property at the figure named by plaintiffs, $3,000,000.00 (and the real value is, probably, not one-half of

this sum), the interest of these five plaintiffs in the aggregate would not exceed $750.00. The amount to be awarded these plaintiffs, if they succeed, is surely not sufficient to make this a case "of peculiar gravity and general importance".

The property right involved depends upon the the construction of certain articles of agreement intended to constitute a Communistic Society. These particular agreements, and similar agreements constituting like Societies, have been many times before various courts of the country, and the decisions are practically uniform upon all the questions raised. There never has been, and is not now, any contrariety of decisions upon the effect of such agreements. There is, therefore, no need of a fourth argument, and a prolongation of this litigation, "to secure uniformity of decision"

The decisions upon the articles of the Harmony Society, and similar articles of other Societies will be found reviewed upon pages 102 to 112, inclusive, of our Brief presented to the Circuit Court of Appeals herewith filed.

The Decisions Below Are Clearly Right.

I. No one of the petitioners, and no one of all their ancestors, ever contributed, granted or donated any property whatsoever to the Harmony Society.

The Master and both Courts below have so found as a fact, and there is now no pretense made to the contrary.

II. The petitioners can have no other rights than as the descendants of non-contributing ancestors.

It must be obvious that no one of the petitioners can have a higher or greater (even if an equal, which we deny) right in the property of the Society than the respective ancestors through whom they claim.

What was the property right of these ancestors?

Did their property right survive a withdrawal from membership in the Society?

Did their property right, upon death, pass, by descent, to the heirs or next of kin or personal representatives of the deceased members?

The petitioners' alleged property rights depend upon these questions, and these questions can be answered *only* by the terms of the articles constituting the Society.

Membership could only be had by signing the articles, and the articles fixed the rights and duties of members. There is absolutely no other evidence as to the rights of members.

There are, at least, six of these articles dated in the following years: 1805, 1827, 1836, 1847, 1890 and 1892. All of these agreements will be found printed in full in our brief in the Circuit Court of Appeals.

The material portion of each as bearing upon the right of property of the members we here give.

Agreement of 1805.

By Article I, the subscribers on their part,

"and on the part of our heirs and decendants *deliver up, renounce and remit all our estate and property consisting of cash, land and chattels, or whatever it may be, to George Rapp and his associates*, in Harmony, Butler County, Pennsylvania, *as a free gift or donation*, for the benefit and use of the community there, and bind ourselves on our part, as well as on the part of our heirs and decendants, *to make free renunciation thereof, and to leave the same at the disposal of the superintendent of the community, as if we never had nor possessed it.*"

By Article III it is declared:

"If contrary to our expectation the case should happen, and we jointly or severally could not stand to it in the community, and we would within a few or more years *break our promises and withdraw from the community.* for whatever cause it may be, *never to demand any reward either for ourselves or children or those belonging to us, for any of our labors or services rendered. but whatever we jointly or severally shall or may do, we will have done as a voluntary service for our brethern.*"

Article V:

"And if the case should happen as stated above, that one or more of the subscribers, after a short or a long period, should break their promise and could or would not submit to the laws of the church or community, and for that or any other cause should leave Harmony, *George Rapp and his associates to refund him or them, the value of his or their property*

brought in without interest, in one, two or three installments, as the same may be, large or small; *and if one or more of them were poor and brought nothing in the community, they shall, provided they depart openly and orderly, receive a donation in money,* according to his or their conduct while a member, or as he or their circumstances and necessities may require, *which George Rapp and his associates shall determine at his or their departure."*

Agreement of 1827.

This agreement declares its purpose to be,

"that the condition of membership should be clearly understood, and that the rights and privileges, and dutes of every individual therein should be so defined as to prevent mistake or disappointment on the one hand, and contention or disagreement on the other."

Therefore, all of the individual members by this agreement, for themselves, their heirs, executors and administrators, do hereby

"give, grant, and forever convey, to the said George Rapp and his associates, and their heirs and assigns, all our property, real, personal and mixed" * * * *"as a free gift or donation,* for the benefit and use of the said association or community; and we do hereby bind ourselves, our heirs, executors and administrators, to all such other acts *as may be necessary to vest a* **perfect title** *to the same in the said association,* and to place the said property at the full disposal of the superintendents of the said community without delay."

Article 3:

By this Article the subscribers provide that, if they do not render faithful obedience, or, from any cause, withdraw from the Society, in this case

"we do expressly covenant and agree to and with the said George Rapp and his associates, *that we will never claim or demand, either for ourselves, our children, or for any one belonging to us, directly or indirectly, any compensation, wages or reward, for our or their labor or services rendered to the said community,* or to any member thereof, but whatever we or

our families jointly or severally shall or may do, all shall be held and considered as a voluntary service for our brethren."

Article 6:

If any member, for any reason, withdraws from the association

"then the said George Rapp, and his associates, agree to refund to him or them *the value of all such property, without interest, as he or they may have brought into the commnnity* in compliance with the first article of this agreement, and the said value to be refunded in one, two or three annual installments, as the said George Rapp and his associates shall determine."

If the party brought nothing in, yet, if he withdraws openly, he shall

"receive *a donation in money*, according to the length of their stay, and to their conduct, and to such an amount as their necessities may require, *in the judgment of the superintendents of the association.*"

Agreement of 1836.

By this agreement, Article 6 of the Agreement of 1827, providing for the return of property donated to the community, upon withdrawal, is denounced, among other reasons, because:

"The principle of restoration of property, besides its pernicious tendency, is one which cannot now be enforced with uniformity and fairness, inasmuch as the members of the association, in the year 1818, under a solemn conviction of the truth of what is above recited, did destroy all record and memorial of the respective contributions up to that time."

Article 2:

"All the property of the Society, real, personal and mixed, in law or equity, and howsoever, contributed or acquired, shall be deemed, now and forever joint and indivisible stock. Each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in land, goods, money or labor; and the same rule shall apply to all future contributions whatever they may be."

Article 3:

"*Should any individual withdraw from the society, or depart this life, neither he, in the one case nor his representatives in the other, shall be entitled to demand an account of such contributions,* whether in lands, goods, money or labor, *or to claim anything from the society as matter of right;* but it is hereby left altogether to the discretion of the superintendents to decide whether any, and, if any, what, allowance shall be made to such member, or his representatives, as a donation."

George Rapp died on August 7th, 1847. His death led to the preparation and execution of the

Agreement of 1847.

By this agreement, the Articles of 1827, excepting Article 6, and the Articles of 1836, are recognized, re-established and continued,

"except so far as the same are affected by the death of the said George Rapp, or hereinafter altered or modified, and to this extent we declare the said articles to remain in full force."

Article 2:

We hereby ordain and establish a Board of Elders, which shall

"consist of nine members of the Harmony Society and their successors, to be chosen as hereinafter provided."

Note: There is nothing to prevent a woman from filling the office of elder.

Article 3:

The Board of Elders shall have and exercise the following powers, to-wit:

"1st. To regulate and manage exclusively the internal temporal concerns of the Harmony Society; to appoint and remove superintendents in the several departments of industry; to make regulations and give orders in relation to their business operations, and generally to take care that members peform the duties assigned to them.

2nd. To determine atl disputes and misunderstandings amongst the members of the society; to advise if necessary, reprove any member who may be in fault or found delinquent in his duty.

3rd. To admit new members into the society and to expel them therefrom. New members when admitted shall subscribe this agreement as the evidence of their membership, and of the rights acquired by, and the duties imposed upon them.

4th. To established regulations for the maintenance and improvement of the morals of the society and for the instruction of its members.

5th. To appoint one or more of its members spiritual leaders and instructions with such authority in relation to church discipline as shall be conferred by the board.

6th. To remove from the Board of Elders and to declare his seat vacated, also to remove from office either or both of the trustees hereinafter appointed for the management of the external affairs and their successors in office.

7th. To fill all vacancies in the Board of Elders occasioned by the death, resignation or removal from office any of its members and their successors, and so as often as a vacancy shall occur, to fill all vacancies in the office of trustee, when either or both of the trustees or their successors shall die, resign his office, or be removed from the same, and so often as a vacancy shall occur.

8th. The concurrence of six members of the Board of Elders shall be deemed the act of the board and a legal exercise of any of the powers hereinbefore conferred on the said board."

Article 4:

"We do further ordain and establish a Board of Trustees for the exclusive management of the external business and affairs of the society, which board shall consist of two persons, who shall be members of the Board of Elders, and their successors who shall be appointed as hereinbefore provided."

Article 5:

"The said trustees shall jointly *and severally* have and exercise the powers following, to wit:

1st. In their own names or that of either of them, or otherwise, to purchase *and sell*, deal, barter, exchange and traffic, make all contracts and bargains in the prosecution of the business, to invest the funds in stocks and other securities, and make transfers and assignments, to collect debts, receive and pay out moneys, settle claims, compromise disputes, insti-

tute legal proceedings, appoint and dismiss agents, clerks and attorneys in fact, and at law, and generally to transact all the external business affairs of the society.

2nd. *To make donations to seceding and excluded members* and to the representatives of those who are deceased and for such benevolent and charitable purposes as they may deem prudent and fit.

3rd. The said trustees shall have power jointly to purchase real estate in their own names and also in their joint names *to grant, bargain, sell and convey all or any of the lands and tenements now or hereafter owned by or belonging to the said society*, and for this purpose to execute deeds of conveyance in fee simple or otherwise in their joint names, but the proceeds of all such sales shall be held in trust for the society."

Under these agreements, and especially since 1847, the Trustees carried on and engaged in almost every conceivable business. They were oil producers and oil refiners, manufacturers of glass, iron, steel, and all kinds of hardware and cutlery and files, of cars, of woolen goods, of silk goods, of bicycles, of whiskey, of beer, of wine. They laid off plan of and sold lots, and, really, built Beaver Falls thereby. They ran saw mills, great and small. Were largely in the timber business and coal business. They built railroads and were a large factor in the construction of the Pittsburgh & Lake Erie Railroad. They organized a bank, and for years it was one of the largest in Western Pennsylvania. They did business in their own names and the names of others. They had agents and partners. They did all this prior to 1890, during which period, the bill in this case, says the society was perfectly conducted.

Under any, or all, of these agreements, it is as plain as human language can make it, that no member had any individual, specific right in, or claim to, any of the property of the Harmony Society. The sole right the individual had was as a member of the community, and that was a common right, and several only in what the covenants of the agreement gave him. These are attending religious meetings and instruction in church and school, etc., in consideration of which the society would feed, clothe, maintain and educate each for his or her life, and their families after them, so long as the joining member or his family continued in the society. If he die, and leave family, they shall be provided for. His with-

drawing from the society rendered it impossible for him to insist upon the performance of the covenants by the society. If no property had been contributed, a donation in money, to be fixed in the discretion of the superintendent, was to be given; but the rights of the individual all are personal; they ended with his or her death or withdrawal; he or she never did have any right to any of the property of the society, *except through and as a part of the society*, and when he or she died or withdrew, neither his or her heirs or personal representatives had any right or claim to the same.

The petitioners concede that their alleged rights of property are based *only* upon the agreement of 1836; that they could have no claim under the other agreements.

As well as we can understand their brief, they assert their right under the Articles of 1836, because, by that agreement, the property of the Society was made "joint and indivisible stock;" that, for one reason or another, the Society was incapable of taking, and the trusts upon which the property was held for the community were void, and, in their own language,

> "the property covered by the trusts, necessarily reverted to the donors of the trust properties, if living, and to the heirs and representatives of those who died *members of the Society.*"

Be it so: it is established as a fact that none of the ancestors, through whom the petitioners claim, were among the donors of any property held by the Society before, or since, 1836.

It is obvious that this claim is made *through the membership* of the ancestor, but if the ancestor's membership was in a Society for any reason incapable of taking or holding, it is impossible that such membership should be capable of transmitting any property right whatsoever. Claiming through, and only through, the Society, this argument of the petitioner's is like the pig, that, in swimming, cuts its own throat.

The Agreement of 1836 was primarily and chiefly intended to strike out the 6th article of the Agreement of 1827, which provided for the return to the seceding member of the value of all his property brought into the Society.

It, therefore,

(a)—Annulled the 6th article and made it void;

(b)—Enacted article 2 as follows:

"All the property of the Society, real, personal and mixed, in law or equity, and howsoever contributed or acquired, shall be deemed now and forever joint and indivisible stock. Each individual is to be considered to have *finally and irrevocably parted* with his contributions, whether in lands, goods, money or labor, and the same rule shall apply to all future contribution whatever there may be";

(c)—Enacted article 3 as follows:

"Should any individual withdraw from the Society, *or depart this life*, neither he, in the one case, nor his representatives, in the other, shall be entitled to demand an account of said contributions, whether in lands, goods, money or labor, *or to claim anything from the Society as a matter of right*. But it shall be left altogether to the discretion of the Superintendent to decide whether any, and if any, what allowance shall be made to such member, or his representative, as a donation".

No portion of the Agreement of 1827 was changed, except the 6th article, unless such change be introduced by articles second and third just cited.

How is it possible for the petitioners to derive a title through this agreement of 1837?

They now claim to represent:

(a)—Persons who died in the Society;

(b)—Persons who left the Society.

How can they, against the plain words of this agreement, claim to recover anything whatever?

These words are:

"Neither he in the one case *nor* his representatives in the other, shall be entitled to demand an account of said contributions whether in land, goods, money or labor, *or to claim anything* from the Society as a matter of right".

The argument of the petitioners is that because in this agreement, in article second, it is said:

"All the property of the Society, real, personal and mixed, in law or equity and howsoever contributed or acquired, shall be deemed now and forever *joint and indivisible stock*,"

that this, in some way, gives them an interest in the property which they did not gain under the Agreements of 1805, 1821 and 1827.

And they claim this, also, in the face of the above provisions and the other portion of this article, which says that

"each individual is to be considered to have **finally and irrevocably** parted with all his former contributions, whether in lands, goods, money or labor, and the same rule shall apply to all future contributions, whatever they may be."

If each individual has forever parted, as this agreement says, with all his former contributions, whether they be represented by lands, or goods, or money, or labor, and that same rule shall apply as to all *future* contributions, how is it possible for his heir or representatives to gain, after his death or withdrawal from the society, any title to this property?

The agreement does say that the entire property shall be considered as

"joint and indivisible stock."

But how does this change the equitable title and right which the society always had to its property? Was it not always joint and indivisible? Did not all the covenants and all the agreements provide that a party dying or leaving, lost all his right, title and interest in and to the common property except that, under the Agreement of 1827, he might have returned to him the value of his contributions?

The Agreement of 1836, saying that it shall be regarded as joint and indivisible stock, in no way changed the title by which it was originally held under the Agreement of 1805 and 1827, and the individual member and his heirs or representatives, after his death or withdrawal from the society, gain no other or greater right than they had under the Agreements of 1805 and 1827.

Indeed, the language of the Agreement of 1836 seems more specifically to bar out these petitioners than that of the other two agreements.

Nor should it be overlooked that, as the society changed in membership from 1805 down to this present date, the members constituting at any one time the society changed their agreements, bought and sold property, made donations, and acted as if they were—as, indeed, they were—the actual owners of all of its property. This was a practical construction of the agreements which should now be of controlling influence.

Topliff vs. Topliff, 122 U. S., 131.

Positions As to the Nature of the Title by Which the Society Held Its Property.

The petitioners admit that *prior* to 1836 no one of them contributed any property of any kind to the society, and the Master has found that no one of them did *since* 1836.

Now, if this be so, let us grant, for the sake of the argument, that the petitioners are right, *i. e.* that the society could not take any title at all to its property.—or that any trust created for it is void,—or that if the trusts are good, they violate the rule against perpetuities—or that the title is a base or conditional fee—how, in any one or all of these contingencies, are the appellants benefited?

If the society has no title to its property, the petitioners can claim none, for it is only through such society that it can reach the property.

If the trust created for the Society is void, or if the trust is good but violates the rule against perpetuities, or if the title is merely a base or conditional fee, how is it possible for the petitioners to benefit thereby?

No one of the petitioners contributed any property whatever.

If the property reverts, it would be to the original grantors, and no one of the petitioners is a grantor.

It seems extraordinary the efforts the petitioners have made to attack the title of the Harmony Society and its Trustees to this property, for it is only through theSociety, as the *bona fide* owner of the property, that they can recover at all. If they could succeed in demonstrating that the title was defeasible and not good, they would effectually, as the Master says, destroy their own case.

Nature of the Title the Trustees and Members of the Society Have.

The original deeds for the property of the Society were all made in fee simple to Frederick Rapp.

In no instance was there any trust or use declared on the face of the deed. The title was absolute and unqualified in Frederick Rapp.

Frederick Rapp did declare that he held the property in trust for the Society by a separate paper.

All the other conveyances to George Rapp, who succeeded Frederick Rapp as the agent, and then to the different trustees ap-

pointed under the Agreement of 1847, gave an absolute title, in fee simple, and without any trust declared.

The title to all the real estate is conveyed to the trustees in fee simple. It is, in each instance, an absolute unqualified estate in fee, without limitation of any kind. It is not conveyed upon any condition of any kind. No one of the members of the Harmony Society ever conveyed, so far as this case shows, any real estate to the Society, but, if any one did, it was just as absolute a conveyance, as shown by the different agreements.

The grantors of all the real estate parted with all their title to the tracts of land conveyed. They were conveyed to the trustees and their heirs.

It is true that, beginning with the original declaration of Frederick Rapp, in 1834, (Record, Vol. 4, p. 619) followed by George Rapp's appointment in 1834, (Record, Vol. 4, p. 613), and this by the Agreement of 1847, the agent and trustees in each instance declared that the property conveyed to them

"is and shall be deemed the common property of said Society."

The

"*said* Society"

as the agreements all show, were the persons who were in membership and constituted part of it.

McKennan, C. Judge in the Speidel case, 15 Fed Rpts., 753, speaking of what this trust was, and for whom, said:

> "The trust alleged here was *instituted for the equal and exclusive benefit of the members of the Harmony Society.* It was part of the religious as well as secular policy of the Society. *Fellowship in the Society was the only recognized title to participation in its benefits. When that fellowship ceased, from whatever cause, all further interest in the trust and all the privileges of membership were necessarily lost and were denied.*"

Mr. Justice Gray, in the same case, said (120 U. S., 377):

> "The trust on which Rapp and the defendants (the trustees) as his successors held the common fund of the Harmony Society is described, in one place in the bill, as for the members of said families, and the contributors of said fund, and for their common benefit, that is to say, as is clearly explained by what goes before, in trust for their common benefit *as a*

community, living together *in the community*, working for the community and supported by the community."

The Harmony Society, composed of those who at the time were its members, were the *cestui que trustents* of the trustees, in whom stood the absolute fee simple legal title to the property. Each one of these members, so long as, *and only so long as*, he was a member was one of the *cestui que trustents*. Whenever he ceased to be a member the *use* shifted from and left him, *because* the very foundation and condition of its existence were taken away. When one became a member of the Society, the *use* for him sprang up and *shifted* so as to include him among the members. When he ceased to be a member the very agreement he signed, by which he became a member, terminated and ended the trust or use.

In *2 Washburn on Real Property*, page 669 (fifth edition), title "Shifting Uses", he uses, as an illustration of them, as follows:

> "An example of a shifting use, as given by the courts, is a grant to incorporate proprietors of land on which it was intended to build a church, *habendum* to said proprietors, &c.; and to each and every person who may hereafter become the lawful owner and proprietor of a pew in said house to be built thereon by said proprietors, the use would legally shift to those who should thereafterwards become pew-holders."

In the Society's Agreement of 1847, provision is made for the admission of future members by the Board of Elders.

Under the original agreements, always, by consent of all the Elders, new members could be admitted.

To the Trustees, say, a parcel of land is conveyed on April 1st, 1870; they hold the same in trust for the members of the Society as such, so long as each continues to be a member. Each member was and is a *cestui que trust*. As a part of and a member in this Society each had such a title as would enable him to compel the use of the real estate for the purposes of the Society and the fulfillment of the covenants contained in the written agreements of all the members.

When a new member came in, a use *shifted* to or sprang up for him, and he became, so long as he was a member, one of the *cestui que trusts*.

When any one left the Society, and thereafter ceased to be a ember of it, the use or trust he had shifted from him to his fellow-embers of the Society. As Judge McKennan says, *ante*, the trust as

"for the equal and exclusive benefit of the members of the Harmony Society."

As Judge Gray, in the same case, said, *ante:*

"in trust for their common benefit as a community, living together in the community."

See, also, *Kerr on Real Property*, vol. 2. sections 1662, 1663.

Quite an instructive case is that of *Second Congregational Society vs. Waring, et al.*, 24 Pickering, 304, which was again considered in the case of *Packard vs. Ames*, 16 Gray's Reports, 328. The opinion in the latter case is short, and we quote it as follows:

"Bigelow, C. J. The construction of the deed from Joseph S. Packard to Micha Packard and others, proprietors. was considered by this Court in *North Bridgewater Congregational Society vs. Waring*, 24 Pick., 304. It was there held that an estate in fee vested in the grantees to the use of the proprietors of pews therein designated, the use shifting to such as should thereafterward become pew holders. No intimation was there made that the conveyance was on a condition subsequent. Nor, on careful consideration of the terms of the grant, can we see any valid ground for holding that such is the true interpretation of the deed. There are no apt or proper words to create a condition; there is no clause of re-entry or forfeiture, The only words which bear any semblance of an intent to restrict the title conveyed by the deed are found in the habendum. These are merely that the grantees, the proprietors of pews, should hold the estate for the purpose of erecting and maintaining thereon a house for public worship. But we know of no authority by which a grant declared to be for a special purpose, without other words, can be held to be on a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate, unless coupled with a clause for the payment of money or the doing of some act by the grantee, on which the grant is clearly made to depend. Without some such clause a grant for a specific purpose can be held at most only to create a trust, but not an estate on condition. *Co. lit.*,

203*a*, 203*a*, 204*b*, 214*b*. *Shep. Touchst.*, 123, 124, 133; *Cowper vs. Andrews*, Hob., 41; *Norfolk's Case*, Dyer, 138*b*. Exceptions sustained."

The Supreme Court of Pennsylvania in *Methodist Church vs. Old Columbia Co.*, 103 Penna. St., 614, cites and approves this case.

Are the Harmony Society Agreements and the Mode of Life of Its Members Contrary to Public Policy?

The petitioners allege that the agreements and mode of life of the society are against public policy, and they specify the following reasons:

That the jurisdiction of the patriarchy extends to municipal control in a manner antagonistic to the constitutional system of the State respecting communities.

That the civil rights of the individual are vested in the patriarch.

That there can be no individual wealth, and, therefore, no "individual contracting."

That the obligations of civil duty are controlled by the patriarch.

That the scheme involves a system of labor which would bring disastrous competition against free labor and is allied to slavery.

> "That the members are concreted into an individual designated as a community, and hence they are not equal before the law, nor are they free, nor does their situation at all brings them within the declarations which are the foundations of the government."

That if the scheme should be successful for a long period, the society would absorb vast amounts of property, and thus defeat the collateral inheritance tax and the law in reference to the distribution of the estates of descendants.

That a community of persons thus isolated and differentiated in all the functions of civil life is against the policy of the law;

That the law condemns celibacy and the non-intercourse of married persons;

That the law also condemns a community of goods, it is socialistic;

That the society could not be incorporated under the laws of Pennsylvania.

Under the agreements each individual had no assignable stock;

The society concentrates, in itself, the wealth which individual contributions and labor pour into its coffers;

And that for these, and many other reasons, the trust in favor of the society must be declared void.

Agreements and Mode of Life Not Contrary to Public Policy.

Every man and woman in the United States may freely live, and agree with each other to live, the life that he or she prefers, provided that such mode of life is not prohibited by the constitution or the laws enacted thereunder.

What portion of the Federal or State Constitution, or of the laws of the State of Pennsylvania, or of the United States, do the agreements of the Harmony Society contradict or its mode of life infringe?

In one aspect it may be regarded as analogous to a partnership; but what law forbids men and women forming a partnership with agreements similar to those of the Harmony Society?

What law forbids the practice of celibacy?

What law forbids a man or woman contracting to work for a partnership or work for a community for boarding, clothing, etc. when he or she so long as they remain in the community is a part owner of the wealth created by his or her work and the work of every one else?

In what respect is the creation of a Board of Elders, giving them supreme authority as to the internal regulations of the Society, contrary to any law? Somebody must be governors or rulers. Indeed, under the corporation laws of Pennsylvania and the limited partnership laws such management is committed to the Boards of Directors and Managers.

If the corporation law provided that a Board of Managers or Board of Directors should remain in office for twenty years instead of one, how would that conflict with the laws of Pennsylvania, or of the United States?

The Harmony Society agreements do not pretend to interfere with any of the laws of the State in reference to the State control all the civil and political functions of life.

The Town of Economy is located in a township called Harmony, and it is, so far as the State laws are concerned, governed and controlled exactly as any other township in the State. Each individual member of the Society has the same civil and political rights to vote for all Township, County, State and United States officers as any other citizen of Pennsylvania.

In what respect does the community of goods violate any constitutional provision?

All the property so communed is liable to the gneral laws of the State governing its acquisition, sale, descent, and distribution. It is subject to taxation for United States, State, County, and Township purposes.

The Agreements of the Harmony Society do not, in any way, exempt a man from or take from a man any one of his civil or political duties or rights.

There is no limit as yet under our constitutions to the acquisition of wealth, and nature, working through general laws, has proved that the ideas of vast and practically unbounded wealth to be gained by a society of this kind are false. The wealth of the Harmony Society, as the testimony shows, has been grossly overestimated, and, to-day, is not one-half of the value of $3,000,000, put upon it by petitioners.

Neither the Shakers, Separastists, Zoarites, Society of Believers, Oneida Community, nor the Economy Society, have made such a brilliant worldly success, especially in America, as would constitute a menace, by the acquisition of vast wealth, to the polity of the State of Pennsylvania or of the United States.

Certainly, the Harmony Society has been a great blessing to Western Pennsylvania. It has built up industries, built railroads, cut down and marketed forests, laid off farms, built towns, and, in various ways, added to the progress, development and civilization of our people.

Each member of the Society, while he remained a member, had an interest, as a use or a trust, in the property, and he, undoubtedly, could have called his fellow members and his trustees to an account if they violated the good faith pledged to him by the Articles of Agreements creating the constitution of the Society.

The petitioners have not cited a single case sustaining their position that these agreements are against public policy, but, on the contrary, the Supreme Courts of Pennsylvania, Massachusetts,

Maine, New York and Ohio, the Supreme Court of the United States, and the Circuit Court of the United States, have all affirmed the validity of the Harmony Society agreements, and agreements framed similar thereto.

Charges Against Mr. Duss.

The charges in the Bill of Complaint against Mr. Duss individually are many and severe.

If the Court will read paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the Bill it will find a collection of charges, *each and every one* of which the Master has found to be false, and the Courts below have affirmed the finding of the Master.

With a maliciousness suggested by personal hatred, the plaintiffs have been induced to insert in the Bill these outrageous charges against Mr. Duss, and they, when called upon the stand, each and every one of them, admitted that they had not any personal knowledge as to the truth of any one of these charges.

The charges contained, among other things, an averment (paragraph 12 of the Bill), that Duss was the friend and confederate of Dr. Cyrus Teed, who was a notorious libertine and presided over an institution in Chicago filled with depraved women, whom he called his angels, and he was designated as the "Messiah," and then the averment is:

> "From the entrance of said Duss into the Harmony Society it had been his design to admit the said Teed and his entire collection of notorious men and women into the Harmony Society, thereby converting this old and religious celibate Society into one closely allied with the free love doctrines of the Oneida and Mormon communities."

There was not a single word of testimony to justify this charge.

Not a *single* word.

The Master and the Court below found it utterly untrue.

But more horrible still, the Bill charged Duss (paragraph 24) to be

> "a man of bad moral character, and is as such utterly unfitted to act as the Scriptural Adviser and head of a religious society; that the said Duss, in addition to holding so-called religious

views utterly at variance with the creed of said Society, had been guilty of gravest duplicity with his cousin, Fredericka R. Kroll, a young girl of some eighteen years of age, formerly a member of his household. in secretly taking her to the Teed residence in Chicago, where she is continually surrounded by the depraved and wanton women who compose the majority of Teed's so-called 'Angels.' "

The witness who offered to support this charge was a defeated suitor against the Harmony Society. His evidence was plainly false upon its face, and he subsequently appeared before the Master and admitted, and stuck to his admissions under the closest cross-examinations, that the entire charge which he swore to was false, and he had been guilty of the most barefaced perjury.

His testimony had, in addition, been overwhelmingly met by that of numerous witnesses called by defendants. Miss Kroll and Mr. Duss both denied it *in toto*. The circumstantial evidence demonstrated its falsity. The Master found against the allegations of the Bill, and the Court below was so impressed with the falseness of this unsupported charge, that it went out of its way and said, after disposing of the case on other grounds, as follows: (see page 359, vol. 1 of the Record):

> "*And now before closing we deem it to be our duty to declare that after the most careful scrutiny of the evidence, it is our judgment that the charges of immorality made against John S. Duss, the senior trustee, in the twenty-fourth paragraph of the Bill, are not sustained by the evidence, but are disproved.*"

Equally baseless are the charges against Mr. Duss that he has conspired to dissolve the Harmony Society and appropriate its property to himself and his confederates.

A brief history of Mr Duss' connection with the Society is as follows:

For many years his mother had lived in Economy, and she finally joined in 1887, at Mr. Henrici's request, the Society. Mr. Duss lived, when a boy, for some time at Economy, left there and went to Mt. Union College, and afterwards went west and married and engaged in one or more occupations for his support. Jacob Henrici, the senior trustee, wrote for him to come back to Economy, and, in accordance with this letter, Mr. Duss returned with Mrs. Duss, with her two children, in 1889. The Society appointed

him as school teacher, and soon afterwards, at Mr. Henrici's and Mr. Lentz's request, he, and subsequently his wife joined the Society, Vacancies occcurred in the Board of Elders and in the Board of Trustees, and Mr. Duss was elected to both, being chosen junior trustee on July 29th, 1890. Prior to this, the external business of the Society had been controlled by Father Henrici and Mr. Lentz. They, however, kept no books, and there was absolutely no record in the Society to prove what property the Society had or what the Society owed. Father Henrici (as his statement published, Record, vol. 3, pages 583 to 597, will show) had peculiar notions in reference to the manner in which the property of the Society should be used, and the result was that he had, prior to July, 1890, dissipated much of the property of the Society, and had involved it very largely in debt.

With the creation of these debts Mr. Duss had absolutely nothing to do, but, during the first year of his trusteeship, he became more and more suspicious as to the financial condition of the Society, and, after a most careful examination, he discovered, to his horror, that the Society was in debt about $1,500,000. Much of this debt was represented by negotiable paper and held by the different banks, and a large part of it, aggregating nearly $1,000,000, was due to the depositors of the Economy Savings Bank, which was a private partnership between Henrici and Lentz, trustees, and Judge Hice and Mr. Reeves, and was authorized by powers of the trustees under the Agreement of 1847, as see *ante*.

The cash assets of the Society had been pledged with the outside banks, and Mr. Duss faced the peril of almost immediate insolvency unless he could realize sufficient money to control the restless creditors.

In this dilemma, James Dickson, an expert accountant, was employed to open and keep a set of books, and to arrange for a system of keeping the accounts of the Society, and Judge Hice and Mr. J. Twin Brooks, Second Vice-President of the Pennsylvania Company, were enlisted for assistance and consultation with Mr. Duss.

In December, 1892, all the members of the Society signed a paper authorizing the Trustees, Henrici and Duss, to give a mortgage on the property to borrow money, and, accordingly, a mortgage was given to Harry Darlington, Trustee, and the Society obtained $400,000.00, and this was subsequently followed by a mortgage, in

February, 1893, for an additional $100,000.00, and this money, with other moneys obtained from the successful handling of the cash assets of the Company, enabled Mr. Duss to pay off the entire debt of the Society, to save the Economy Savings Bank from closing its door, and to save for the members of the Harmony Society a large part of their landed estate, subject, however, to the $400,000.00 mortgage above mentioned.

While the Society was in this greatest peril of its life, and while Mr. Duss, with the assistance of Judge Hice and Mr. Brooks, was making every effort to provide money to pay the depositors at the Economy Savings Bank, *Henry Feucht*, one of the members of the Society, on February 10th, 1893, with several other members that he induced to join him, filed a Bill in Equity in the Common Pleas of Beaver County, making numerous charges against Duss, and asking for the appointment of a Receiver and the dissolution and distribution of its property. This Bill precipitated and caused a run on the Economy Savings Bank, and very nearly neutralized and defeated the efforts that Duss had made to save, at least, a portion of the assets of the Society.

The case came on for hearing in the Common Pleas of Beaver County, and, after a hearing, and on March 3rd, 1893, the Court refused a motion for a preliminary injunction.

The Feucht family, the plaintiffs in the bill, and especially Henry Feucht, who has been the aspirant for the position on the Board of Elders and on the Board of Trustees which Duss subsequently obtained, caused such commotion and trouble in the Society, that it was concluded that it was better to have them retire, even if the donation which the Trustees were authorized under the Agreement of 1847 to give to any retiring member was large. The Feuchts did exact from the Society in its then involved condition a large amount of money, but all the other plaintiffs in the Feucht bill, being Dorothea Hoehr, Regina Lautenschlager, Edward Kellerman and Christian Rall, remained with the Society, alleging that they had been induced to sign the bill by misrepresentations.

The Feucht litigation, as the Master found, and as the facts fully demonstrate, stirred up the members of the Harmony Society and caused a number of them to withdraw.

It is not true that any one of them withdrew at the instance or at the request of Mr. Duss. On the contrary, it is true that Mr.

Duss endeavored to prevent a number of them leaving the Society, and, especially to prevent all of those who were valuable members.

He labored with Siber, Miller, Niclaus and Fredericks to stay, but one and all, frightened by the Feuchts litigation and fearing the insolvency of the Society, withdrew, and, upon their withdrawal, the donations, under the Agreement of 1847, were fixed approximately at but little less than the amount paid the Feuchts.

The public press became full of discussion as to the financial condition of the Harmony Society, its large debt, and the internal commotions, and reported at length the litigation in Beaver County.

The result of it all was that Henry Feucht, seeing that Mr. Duss had, at last, succeeded in rescuing the Society from insolvency, and with the most bitter and revengeful feelings against him, stirred up this new litigation, and, after the litigation began, was the star witness for the appellants throughout the case.

To him the testimony traces these scandalous charges against Mr. Duss, and it is not too much to say that his personal animosity towards Duss, and his revengeful feelings, because of Duss' success in the Society, were the causes of this litigation. At least, if not the causes of this litigation, the causes of the bitter charges that were made in the bill.

As to the charges against Mr. Duss of intention to wreck the Society, the Court below, expressly approved by the Circuit Court of Appeals, has said.

> "In respect to the alleged conspiracy to wreck and dismember the Harmony Society, we feel called upon to say that we fully agree with the conclusion of the Master. The acts here principally complained of, we think, designed, not to destroy but to save it from the consequences of business mistakes *made by none of the present officers* or members of the Society, and for which none of them are at all responsible. The measures resorted to in the emergency which was upon the Society were successful in extricating it from great financial peril. Those measures were adopted and carried out under the advice of eminent counsel, whose rectitude of purpose the Court cannot doubt."

The Membership of the Harmony Society, by Reason of These Withdrawals and Deaths, Has Dwindled Down to Nine Persons. No New Members Have Been Admitted Since 1893.

Not a single person, since the Feucht litigation in 1893, has applied for admission to the Society. That litigation, and the trouble resulting therefrom, and the present litigation, threatening the very life and existence of the Society, have been an absolute bar to any desirable and responsible people applying for admission to its fold.

It is true, perhaps, that the tramps that line the highways would even now, or at any time since 1893, have come into the Society, but it is equally true that they would have been undeserving members and prejudicial to the best interests of the community.

The charges and insinuations that Mr. Duss is conspiring for his own survivorship in, and thus become the owner of, all the property of the Society, is as baseless as were the charges in the bill as to his moral character. He is a gentleman of firm and decided character, whose task in life, it seems, has been to stand up for the right as against the most unfounded charges and slanders, and even against perjury itself. He has stood manfully for the Society and the interests of its aged members, who, if Feucht and the others, including the petitioners, had their way, would have been turned out to starve.

Mr. Duss joined in January, 1890. He became a member of the Board of Elders at the same time, and subsequently fifteen new members joined in 1890.

In 1892 three new members joined.

In 1893, one new member.

4044

The Dissolution of the Society.

The Master treated this question at length, as did the Court below, and, closely examined, it utterly fails to show the least sign of the dissolution of the Harmony Society.

The bill said it was dissolved in two ways:

(1) By the common consent of its members; and.

(2) By the abondonmant of the principles for which it was organized.

(1) Was it abandoned by common consent, as shown hereinbefore?

There is not a particle of evidence to support this.

On the contrary, the written Agreements of 1890 and 1892 expressly assert to the contrary.

(2) Has it been dissolved by the abandonment of the principles for which it was organized?

The Master and both of the Courts below, after reading the entire testimony, have found as a fact that there has been no abandonment of either principles or purpose. This is a question of fact wholly dependent upon a large amount of testimony offered on the subject, and, after the careful consideration thereof given by the Master and the Courts below, this Court will surely regard the discussion as closed.

Partition of Property.

The payment to retiring members is said to have been a liquidation and the dissolution of the Society.

As we have seen, the members who at the time constituted the Society were the absolute owners, through themselves and their trustees, of all its property, and they might at any time dispose of it. The idea that, because they gave to certain retiring members certain sums of money, therefore, this was a dissolution of the Society, is difficult to see. If the Society owned the property they might do with it as they saw fit, and, no matteer to whom or for what they gave their property, it was their own, to do with as they liked.

Besides the Agreement of 1847 authorized the donation to retiring members.

The Union Company.

Under the Agreement of 1847 the Trustees had the power to change realty into personality, and personalty into realty.

For reasons explained by Mr. J. Twing Brooks and Judge Henry Hice, it was deemed advisable to convey the title to the real estate to the Union Company, a corporation of the State of Pennsylvania, giving to the Trustees of the Harmony Society all the capital stock except so much as would make eligible members of the Board of Directors, the stock loaned for this latter purpose being in the shape of certificates endorsed in blank and left with the Harmony Society.

The Society after the conveyance owned the stock, *all of it*, and, therefore, owned all the assets of the Union Company. They did not convey to the Union Company as a part of the liquidation, and it in no way deprived the Society of any portion of the property which theretofore the Society had owned. It was a mere change in the mode in which the title was held.

Celibacy.

The claim of the petitionersbeing that Mr. Duss and his wife have abandoned celibacy, is wholly untrue.

They do live at the Great House, as did Father Rapp and his wife in his day, his daughter and granddaughter, but there is absolutely no testimony that they live together as man and wife.

Henry Feucht, plaintiffs' chief witness, testifies, page 463, Vol. 2 of the Record, that he was born during the time that his father and mother were members of the Harmony Society, and that, in addition thereto, his brother and sister were also born during that time, and prior to the death of Father Rapp.

Page 464:

> "Q. Was that during the time that your father and mother were members of the Harmony Society that they had four children?
>
> "Yes, sir."

Yet it is now argued by petitioners that celibacy was always a cardinal doctrine of the Society.

Upon this question of dissolution, the Court below, confirming the Master, said:

> "The proofs show that the Society is in full life. *There has been no dissolution of the Society, either by the common consent of the members, or by their acts* The membership, indeed, has become greatly reduced, but the right of the Society, as now constituted, are as sacred in the eye of the

law, as they were when the membership was twenty fold greater. The Society as an organization, exists in law and in fact. *Under the evidence, the findings of the Master, upon this branch of the case, undoubtedly are right.*"

D. T. WATSON,
JOHNS MCCLEAVE,
Attorneys for Respondents.

Opinion of the Court of Appeals.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD DISTRICT.

Christian Schwartz, a citizen of the State of West Virginia, Antony Koterba, David Strohaker and Allen Shale, citizens of the State of Ohio, and G. L. Shale, a citizen of South Dakota, Appellants,

vs.

John S. Duss, Gottlieb Riethmueller, Franz Gillman, Conrad Hermansdoerfer, Edward Kellerman, Johanna Hermansdoerfer, Susie G. Duss, Karoline Molt, Katrina Nagel, Elizabeth Beck, Maria Diem, Barbara Boeh, Fredericka Muntz, Dorothea Hoehr, Regina Lautenschlager. Christian Rall, Henry Hice and John Reeves, citizens of the State of Pennsylvania, and The Union Company, a corporation citizen of the State of Pennsylvania.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Before Dallas and Gray, Circuit Judges, and Bradford, District Judge.

GRAY, J.

This is an appeal from the decree of the Circuit Court for the Western District of Pennsylvania. The plaintiffs below, appellents here, seek in this suit to recover a portion of the property of the Harmony Society, which they allege is defunct, and claim that its property ought to be distributed among those entitled thereto.

In the year 1803, George Rapp and his son John, and several of their friends, left the Kingdom of Wurtemberg, came to the United States, and located at a place called Harmony, in Butler County, Pennsylvania, where they were joined by a considerable number of other emigrants. They remained there until the year 1814, when they removed to Posey County, Indiana, where they remained until the year 1825, when, becoming dissatisfied, they moved back to Pennsylvania, and located at Economy, in Beaver County, Pennsylvania, where they ever since have resided. They formed a society or an association called "The Harmony Society", and in 1805 they made the first written contract between them.

The said Society was organized upon the principle of community of goods and land ownership. The members of the said Society who had brought with them from Wurtemberger money, combined their funds and held all their property in common, they lived as members of a common household, and each member enjoying alike with every other the fruits of their common labor in equality and brotherhood. The occupation or business of said Society was agriculture, except in so far as it was necessary to manufacture shoes, clothing and other necessaries for the community. The members of said Society obeyed George Rapp as their spiritual and temporal leader and ruler. The only laws or rules governing said Society were made by him, the members thereof having no voice in their enactment.

About the year 1807, the community promulgated the doctrine of celibacy, as being necessary for the success of a communistic society.

The agreement of 1805, "Exhibit A," p. 47, Vol. 1, Record, is as follows:

> "Be it hereby known to all who need to know that the following agreement has this day been made and concluded between us, the subscribers of the one part, and George Rapp and his associates of the other part:
>
> **Article 1.**
>
> "We, the subscribers, on our part, and on the part of our heirs and decendants, deliver up, renounce and remit all our estate and property consisting of cash, land and chattels, or whatever it may be, to George Rapp and his associates, in Harmony, Butler County, Pennsylvania, as a free gift or donation, for the benefit and use of the community there, and bind

ourselves, on our part, as well as on the part of our heirs and decendants, to make free renunciation thereof, and to leave the same at the disposal of the superintendents of the community as if we had never had nor possessed it.

Article 2.

"We do pledge ourselves jointly and severally to submit to the laws and regulations of the community, and to show due and ready obedience toward those who are appointed and chosen by the community as superintendents in such manner that not only we ourselves endeavor, by the labor of our hands, to promote the good and interest of the community, but also to hold our children and families to do the same.

Article 3.

"If, contrary to our expectation, the case should happen, and we jointly or severally could not stand to it in the community, and we would within a few or more years break our promise and withdraw from the community, for whatever cause it may be, never to demand any reward, either for ourselves or children, or those belonging to us, for any of our labor or services rendered, but whatever we jointly and severally shall or may do, we will have all done as a voluntary service for our brethern.

"In consideration whereof George Rapp and his associates adopt the subscribers jointly and severally as members of the community, whereby each of them obtains the privilege to be present at each religious meeting; not only they themselves, but also their children and families, shall and will receive the same necessary instructions in church and school which is needful and requisite for their temporal good and welfare as well as eternal felicity.

Article 4.

"George Rapp and his associates promise to supply the subscribers jointly and severally with all the necessaries of life, as lodging, meat, drink and clothing, etc., and not only during their healthful days, but also when one or more of them become sick or otherwise unfit for labor, they shall have and enjoy the same support and maintenance as before; and if, after a short or long period the father or mother of a family should die, or be otherwise departed from the community, and leave a family behind, they shall not be left widows or orphans, but partakers

of the same rights and maintenance as long as they live or remain in the community, as well in sick as healthful days, the same as before, or as circumstances or necessity may require,

Article 5.

"And if the case should happen as stated above, that one or more of the subscribers after a short or long period, should break their promise and could or would not submit to the laws and regulations of the church or community, and for that or any other cause would leave Harmony, George Rapp and his associates promise to refund him or them the value of his or their property brought in without interest, in one, two, or three annual installments, as the sum may be, large or small; and if one or more of them were poor and brought nothing in the community, they shall, provided they depart openly and orderly, receive a donation in money, according to his or their conduct while a member, or as he or their circumstances and necessities may require, which George Rapp and his associates shall determine at his or their departure."

"In confirmation whereof, both parties have signed their names.

"Done in Harmony, February 15, 1805."

They became the owners of about seven thousand acres of land at Harmony, Butler County, which, on May 6th, 1815, was conveyed by Frederick Rapp, as their attorney in fact, to Abraham Ziegler, for the consideration of $100,000. And in that year, or in 1814, the Society removed from Butler County, Pennsylvania, to Posey County, State of Indiana, where, in 1821, a second agreement with each other, in German, was entered into by them.

In 1825 the Society removed from Indiana to Beaver County, Pennsylvania, where they purchased and settled upon a tract of land containing about 3,000 acres, now known as "Economy," where they have since remained, and which has since become very valuable, and on which they have erected many buildings, including dwellings and factories of various kinds, and made many valuable improvements.

After the settlement at Economy, in 1827, another agreement was entered into and signed by all the then members of the association. This agreement is substantially the same as the agreement of 1805, in so far as it relates to the rights and duties of the mem-

ers of the Society. It had, however, in it a stipulation, constitut-ıg the sixth article, that the Society would refund to any members ho, for any reason should withdraw therefrom, "the value of all ıch property as he or they may have brought into the community, ı compliance with the first article of this agreement." And if the ersons withdrawing were poor, and brought nothing into the com-ıunity, they should, nevertheless, receive a donation of money ac-ording to the length of their stay, and to their conduct and neces-ities, in the judgment of the superintendent of the association. n 1836, owing to troubles occasioned by a secession of members, was deemed wise to abrogate this article, and accordingly an greement supplementary to that of 1827 was entered into by all f the then members of the community in which "the principle f restriction of property" was, for reasons stated, renounced, and ıe said sixth article of the agreement of 1827 was expressly and ıtirely "annulled and made void as if it had never existed," all ther articles remaining "in full force as heretofore." This supple-ıentary agreement then provided as follows:

"2nd. All the property of the Society, real, personal and mixed, in law or equity, and howsoever, contributed or acquired shall be deemed, now and forever joint and indivisible stock. Each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in land, goods, money or labor; and the same rule shall apply to all future contributions whatever they may be.

"3rd. Should any individal withdraw from the society, or depart this life, neither he, in the one case nor his representatives in the other, shall be entitled to demand an account of said contributions, whether in land, goods, money or labor, or to claim anything from the society as matter of right. But it shall be left altogether to the discretion of the superintendent, to decide whether any, and if any, what allowance shall be made to such member, or his representatives as a donation."

After the death of George Rapp, in 1847, and in that year, other agreement was entered into by the then members of the so-ıty, confirming the agreements of 1827 and 1836, except so far as e same were affected by the death of the said George Rapp, and oviding for a different scheme of administration. The executive

powers which had theretofore been mainly exercised by the said Rapp, were vested in a Board of nine Elders, to be chosen as therein provided.

The agreements of 1827, 1836 and 1847, are those under which, or some of which, the plaintiffs claim the right to share in the property and assets of the society, as heirs of former members. The bill alleges that the complainants were heirs and next of kin of those who either were members of the society and withdrew from the same before the execution of the agreement of 1836, or of those dying in the society before that time, or of those who died members of the society after having joined in the agreements of 1834 and 1847.

The bill alleges that the defendant, John Duss, with others entered into a conspiracy, on more than one occcsion, to wreck the society and take to himself and his co-conspirators the property and assets of the same. The bill further alleges that there had been, prior to and up to the time of filing of the bill, such an abandonment by the defendants, constituting the present membership of the society, of the principles and purposes upon which the said society was founded, as to work a dissolution of the same. The complainants, therefore, contend that, such being the case, the present property of said society reverts to the complainants and such others as were heirs at law and next of kin of those who contributed and gave to the said society its property.

To support the charge of abandonment of the purposes of the society, various specific allegations are made concerning the alleged immorality of John Duss and others of the defendants, of the intemperance alleged to prevail among them, and the alleged renunciation of the religious principles generally, upon which the society was founded.

In view of the findings of the Master, hereinafter referred to, it is unnecessary to consider these allegations in detail.

After the cause was at issue, upon the agreement and request of the parties, the Court below appointed W. W. Thompson, Esquire, as Examiner and Master, with authority to hear and take all the testimony, and find all the issues of fact and law, and to report the testimony and such findings to the court. In pursuance of this appointment, a great amount of testimony was adduced by the parties and taken by the Examiner, who returned the same to the Court below, together with a long and most elaborate report, embodying

his findings, as Master, of the facts and conclusions of law arising thereon. To these findings of the Master, exceptions were duly taken and filed, and argued before the court below. That court, after hearing the case upon the pleadings and evidence, the Master's report and the exceptions thereto, made a decree, dismissing the complainants' bill. From this decree an appeal has been taken to this court, and numerous exceptions have been filed. But it is only necessary to consider the underlying questions. These are succinctly and correctly stated by the Master, in his report, as follows:

"First. Have the plaintiffs, or any of them, such proprietary right or interest in the property and assets of the Harmony Society as entitled them, upon the dissolution of the society, to any part of, or share in, such property or assets or as entitled them to the account prayed for in the bill?

"Second. Has the Harmony Society been dissolved by the common consent of the members or by an abandonment of the purpoes for which it was formed?"

"These obviously fundamental and determining questions have been most ably discussed by the Master in the light of the testimony and documentary evidence, all of which, together with the Master's report, are contained in the Record before this court.

"The findings of fact by the Master bearing on the first of these questions, were as follows:

"1st. That none of the plaintiffs were ever members of the society.

"2d. That all of those members of the society through whom Christian Schwartz claims as their heirs, signed the agreements of 1836 and 1847, and continued members until their death.

"3d. That Anthony Koterba claims as heir of his father, Joseph Koterba, and his half-brother, Andreas Koterba, and that Joseph Koterba joined in the organization of the society, and also signed the agreement of 1827, and afterwards, in 1827, withdrew from the society; and that Andreas Koterba signed the agreements of 1827, 1836 and 1847, and died a member of the society.

4th. That the grandparents of David Strohaker, viz,, Christian Strohaker and wife, and Matthias Rief and wife,

joined the society in 1805, and all remained members until their death—all dying between 1820 and 1825, except Mrs Rief, who died between 1830 and 1836. That his father, Christian Strohaker signed the agreement of 1827, and withdrew from the society in 1827. That his aunt, Catharina Strohaker, signed the agreement of 1827, 1836 and 1847, and continued a member of the society until her death.

5th. That Lawrence Scheel and Jacob Scheel, ancestors of Allen and G. L. Shale, joined the society in 1805; that Lawrence withdrew in 1824, or 1826; that Jacob Scheel signed the agreement of 1827, and died a member, about 1837.

6th. That none of the parties, through whom the plaintiffs claim, contributed any money or property to the society."

"As a conclusion of law upon the facts thus found, the Master reports: "The plaintiffs, therefore, under their agreements have no claims on the property of the society through any of their ancestors. Not through those who withdrew before the execution of the agreement of October 31st, 1836, because those who withdrew had had returned to them the value of any property they might have contributed, and had received compensation for their interest or part in the society or its property. Not through those who died in the society before 1836, because all their interest in the property had become vested in the society, and did not descend to their heirs. And not through those who died in, or withdrew from, the society after the agreement of 1836, because they had by that agreement expressly renounced for themselves and their heirs all right to claim anything on their withdrawal or death. In all the cases cited above the principle of survivorship in the remaining or surviving members was recognized as existing, and approved and enforced."

As a mixed finding of fact and of law, the Master, for reasons set out at great length in his report, answers the second question above stated, as follows: "That there has been no abandonment of the purposes for which the Harmony Society was founded, and that the said Society has not been dissolved by reason of any such abandonment, and that the plaintiffs are not entitled to the relief prayed for in the Bill". The report ends with a recommendation by the Master, that the Bill of Complainants be dismissed, with costs.

Where the Court, with the consent and by the agreement of parties, appoints a Master, and confers upon him "authority to hear and take all the testimony, and find all the issues of law and fact", as in this case, in so far as the report of the Master, and the Opinion of the Court find facts, such findings are considered as conclusive in this Court, unless plain error be unmistakably shown, from the great preponderence of evidence in the case.

Met. Bank vs, Rogers, 53 Fed. Rep. 776.
Kimberley vs. Arms, 129 U. S. 525.
Dravo vs. Fahill, 132 U. S. 487.

The findings of facts made by the Master were confirmed by the Court below. The learned Judge of that Court, in his opinion, states that he read all the testimony in the case, in order to come to an independent conclusion, and that the conclusion so arrived at agreed entirely with that reported by the Master. Such finding by the Master and by the Court, unless found by this Court to be unmistakably and plainly erroneous, will be binding here, and will determine this case adversely to the complainants, and make unnecessary any examination of the questions of law that might have been involved upon different finding of fact. A careful examination of the testimony and evidence contained in the record before us, not only fails to make manifest any such plain and unmistakable error in these findings, but convinces this Court that they were in all respects justified.

The learned Judge of the Court below has so completely covered all the questions of law and fact arising in this case, and necessary to its determination, that we feel constrained to adopt as our own, his opinion, as we find the same in the record, part of which we hear repeat as follows:

"The plaintiffs sue as heirs of certain persons who were formerly members of the Harmony Society and who continued to be members until their voluntary withdrawal or death. The bill is against all the persons who composed the Society at the commencement of the suit, namely, June 27th, 1894, the membership then embracing sixteen persons. The bill joins as co-defendants with the members of the Harmony Society, Henry Hice, John Reeves and the Union Company, a corporation, the bill charging that these three defendants and the defendant John S. Duss, a member of the Society and the senior Trustee thereof, were acting together in a conspiracy to wreck and

dismember the Society and appropriate to themselves the entire assets of the Society. The bill further alleges that all the purposes for which the Society was founded and its established practices had been abandoned, and that by common consent the Society had ceased to exist as an association and had been dissolved, and that 'the assets of such dissolved association have reverted to the donors thereof, among whom were the ancestors and intestates of the plaintiffs. The bill prays for the appointment of a Receiver and for the division and distribution of the assets of the Society amongst the persons legally entitled thereto, including the plaintiffs. All the defendants have answered the bill. In their answers they all deny the above recited charges and allegations and all the averments in the bill upon which the plaintiffs' supposed right to relief rests; and they also deny that the plaintiffs have any interest whatever in the property of the Harmony Society or any right to intermeddle with its affairs. * * * * * * * * * * * * * * In conformity with the agreement of the parties and pursuant to the order appointing him, the Master took a large amount of testimony and made findings which are embodied in a written report to the Court. The Master filed with his report the testimony and exceptions taken by the plaintiffs to his findings.

"The cause has been heard upon the pleadings and evidence, the Master's report and the exceptions thereto.

"The report of the Master is altogether adverse to the plaintiffs. He finds that the charges of conspiracy and misconduct and the allegations of abandonment of the purposes and established practices of the Harmony Society and of the dissolution of the Society, contained in the bill, are not sustained by the evidence, and that they are not true. Upon every material question of fact, the finding of the Master is distinctly in favor of the defendants, and he recommends the dismissal of the bill.

"The Master's report covers the entire case and evidences the most careful consideration of every question here raised. Nevertheless, the Court has felt it to be its duty to make an independent investigation of the facts and merits of the case: and therefore we have attentively read and considered the whole of the evidence. Avoiding, as needless, a particular

discussion of the numerous exceptions to the Master's report, we will briefly state our general views and conclusions:

"The constitution of the Harmony Society is embodied and the general purposes of the association are set forth in a series of written agreements executed in the years 1805, 1821, 1827, 1836, 1847 and 1890. These agreements were signed at their respective dates by all the then members of the Society. By the agreement of 1805 the doctrine of community of property became, and by the subsequent agreements continues to be, a fundamental principle of the Society. Its acceptance is an essential condition of membership. By the constitution of the Society, individual ownership of property is renounced in favor of the community, or Society. The members have all things in common, and each is entitled to receive from the Society necessary maintenance, support and education, and in return, each is bound to render to the Society labor and obedience. The agreement of 1827 contained a provision that if any member withdrew from the Society there should be refunded to him the value, without interest, of all the property he had brought into the community. The agreement of 1836, however, rescinded that provision wholly, and stipulated that if any individual shall withdraw from the Society, or depart this life, neither he, in the one case, nor his representatives in the other, shall be entitled to demand an account of his contributions, whether in lands, goods, money or labor, or to claim anything from the Society as a matter of right; but that it shall be left altogether to the discretion of the Superintendent to decide whether any, and if any, what allowance shall be made to such member, or his representatives, as a donation.

"In view of the decision of the Supreme Court of Pennsylvania, in *Schriber vs. Rapp*, 5 Watts, 351, and the decisions of the Supreme Court of the United States in *Goesele et. al. vs. Bimeler et al.*, 14 How., 589, and *Baker et al. vs. Nachtrieb*, 19 How., 126, it is clear that the above recited articles of agreement are valid contracts, and that thereunder, upon the death of a member of the society in fellowship, no claim enforceable against the Society or its property passes to his heirs or personal representatives, and that since 1836 no member voluntarily withdrawing from the Society could acquire any such claim.

"Now, not one of the plaintiffs was ever a member of the Harmony Society. Furthermore, it does not appear that any of the persons through whom the plaintiffs claim, contributed any money or property to the Society. The Master has found that no such contribution was ever made by any of those persons. The correctness of that finding has not been impeached. All the members through whom the plaintiffs claim who left the Society, withdrew in or before the year 1827. Presumably they retired upon terms satisfactory to themselves. If, however, those persons so withdrawing had any legal demands against the Society, those demands have been barred by lapse of time. *Spiedel vs. Henrici*, 120 U. S. 377. The other persons through whom the plaintiffs claim remained with the Society and died in fellowship. They had received and enjoyed all the benefits secured to them by the recited articles of agreement, and therefore, no rights enforceable against the Society passed from them to their heirs or personal representatives.

"The soundness of the view that the deceased ancestors and the collateral relatives of the plaintiffs could transmit to them no rights enforceable against the Harmony Society as a living organization, is impliedly conceded by the bill, for it alleges that the Society had come to an end. The bill proceeds upon the theory that a dissolution of the Society had been brought about. Upon this assumption, and under the allegation 'that recently said Harmony Society has become dissolved as aforesaid'; the bill prays that the Court take charge of the assets of the Society and distribute the same amongst the parties legally and equitably entitled thereto.

"But the hypothesis of dissolution is not well founded. The proofs show that the Society is in full life. There has been no dissolution of the Society, either by the common consent of the members or by their acts. The membership, indeed, has become greatly reduced, but the rights of the Society, as now constituted, are as sacred in the eye of the law as they were when the membership was twenty fold greater. The Society as an organization exists in law and in fact. Under the evidence, the findings of the Master, upon this branch of the case, undoubtedly are right. Hence, the very foundation of the bill fails. The plaintiffs do not show that they are entitled to any equitable relief whatever.

"It is not necessary, nor would it be proper, for the Court to express any opinion as to what would be the legal status and the ultimate disposition of the property of the Harmony Society, were its existence terminated by the death of all its members, or were a dissolution of the Society otherwise effected. No such questions are before us. We are not dealing with the assets of a defunct or dissolved association.

"In respect to the alleged conspiracy to wreck and dismember the Harmony Society, we feel called upon to say that we fully agree with the conclusion of the Master. The acts here principally complained of, we think, designed, not to destroy the Society, but to save it from the consequences of business mistakes made by none of the present officers or members of the Society, and for which none of them are at all responsible. The measures resorted to in the emergency which was upon the Society were successful in extricating it from great financial peril. Those measures were adopted and carried out under the advice of eminent counsel, whose rectitude of purpose the Court cannot doubt.

"And now before closing, we deem it to be our duty to declare, that after the most careful scrutiny of the evidence, it is our judgment that the charge of immorality made against John S. Duss, the senior Trustee, in the twenty-fourth paragraph of the bill, are not sustained by the evidence, but are disproved.

"The general rule in Equity that costs follow the decree, we think, should be applied here, under the circumstances. *Swetzel vs. Penn Bank*,, 147 Pa., 140, 154. The bill alleges conspiracy, fraud and immorality, and those grave charges have not been withdrawn. Having justly vindicated themselves from these charges, the defendants are justly entitled to full costs."

The decree of the Court below, dismissing the bill, is affirmed.